Supreme Court, U.S.
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No. 02-1590

In The Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*

and

THE WILDERNESS SOCIETY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Antiquities Act of 1906, 16 U.S.C. §§ 431-33, contain intelligible principles that render it a constitutional grant of authority to the President?

2. Does the Antiquities Act empower the President to create a National Monument in order to protect natural objects?

3. May a plaintiff raise a statutory challenge to the creation of National Monuments for the first time on appeal when the complaint alleged only that their creation was unconstitutional and *ultra vires*?

4. If a plaintiff may raise a statutory challenge to the creation of National Monuments for the first time on appeal when the complaint alleged only that their creation was unconstitutional and *ultra vires*, may that challenge be dismissed when the plaintiff fails to allege a single fact in support of its claim?

OBJECTIONS TO QUESTIONS PRESENTED BY PETITIONERS

1. The first issue presented by Petitioners is "[w]hether judicial review is available to enforce the limitations on presidential authority contained in the Antiquities Act." This issue is not before this Court because: (1) the court below held that judicial review was available and Petitioners do not dispute that fact; and (2) Petitioners' complaint does not raise any statutory claims under the Antiquities Act.

2. The second issue presented by Petitioners is "[w]hether the courts below abdicated their responsibility to determine whether statutory restrictions have been violated." This issue is not before this Court because Petitioners' complaint does not raise any statutory claims under the Antiquities Act.

3. LIST OF PARTIES

The following are parties to this proceeding:

1. Petitioner:

Mountain States Legal Foundation
The Blue Ribbon Coalition, Inc.

2. Respondents:

George W. Bush
The Wilderness Society
Natural Resources Defense Council
Soda Mountain Wilderness Council
National Wildlife Federation
Defenders of Wildlife
Sierra Club
National Trust for Historic Preservation
Society for American Archaeology

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Wilderness Society, Natural Resources Defense Council, Soda Mountain Wilderness Council, National Wildlife Federation, Defenders of Wildlife, Sierra Club National Trust for Historic Preservation, and Society for American Archaeology have no parent companies and issue no corporate stock.

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INTRODUCTION

This case concerns an effort by Petitioners Mountain States Legal Foundation *et al.* (collectively "MSLF") to abolish six National Monuments created by President Clinton in 2000 and 2001. MSLF's constitutional and *ultra vires* challenges to the creation of these National Monuments were dismissed from the bench by the district court. MSLF App. at 16-31.[1] The district court's decision was subsequently affirmed by a unanimous panel of the D.C. Circuit. *Id.* at 1-13. After failing to win *en banc* review of the panel's decision, MSLF responded with the instant petition. *Id.* at 32-33 (denying MSLF's petition for rehearing *en banc*).

MSLF's petition should be denied. First, The Antiquities Act is a constitutional delegation of Congress's Property Clause power because the statute provides "intelligible principle[s]" that guide the President's actions. Second, MSLF's claim that the President acted *ultra vires* because the Antiquities Act allegedly allows the President to create National Monuments to protect only man-made objects already has been rejected by this Court and others, which have uniformly recognized that the phrase "and other objects of historic or scientific interest" in the Antiquities Act leaves the President ample authority to create National Monuments to protect natural objects. In any case, the six Monuments at issue were created to protect both human and natural objects. Third, this Court need not consider whether the district court applied the appropriate standard of review for statutory claims under the Antiquities Act because MSLF's complaint presents no such claim. Because *ultra vires* and

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[1] The abbreviation "MSLF App." is used throughout to refer to the appendix to MSLF's Petition for Writ of Certiorari. "App." refers to the appendix to this brief in opposition. "MSLF Pet." refers to MSLF's Petition for Writ of Certiorari.

constitutional claims – which are alleged in MSLF's complaint – are distinct from statutory claims – which are not alleged – MSLF may not win a reversal on the grounds that the courts below should have applied a more exacting level of review to statutory claims. Fourth, even if MSLF had raised a statutory claim in its complaint – which it did not – that claim would have been properly dismissed because MSLF's complaint failed to provide a single factual ground for a statutory claim.

STATEMENT OF THE CASE

A. The Creation Of The National Monuments At Issue In This Case

The Antiquities Act provides in relevant part that:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments ....

16 U.S.C. § 431 (emphasis added). Over the last ninety-seven years, presidents have established more than 100 National Monuments pursuant to the Antiquities Act. These Monuments have encompassed some of the nation's most renowned and unique lands and cultural sites, including the Grand Canyon, Death Valley, Denali, and the Grand Tetons.

Like nearly every other president in the preceding century, President Clinton used his power under the Antiquities Act to create National Monuments. His creation of six particular National Monuments is challenged by MSLF in this case: (1) the Grand Canyon-Parashant National Monument in Arizona; (2) the Canyons of the Ancients

National Monument in Colorado; (3) the Cascade-Siskiyou National Monument in Oregon; (4) the Hanford Reach National Monument in Washington State; (5) the Ironwood Forest National Monument in Arizona; and (6) the Sonoran Desert National Monument in Arizona. President Clinton established these Monuments in order to protect an array of man-made and natural objects of historic and scientific interest. *See* MSLF App. at 56-97 (proclamations creating these National Monuments).

B. The Proceedings Below

The National Monuments that MSLF is trying to abolish through this action were created in January and June, 2000, and in January, 2001. MSLF App. at 56-97 (National Monument proclamations). On August 29, 2000, MSLF filed its initial complaint for declaratory and injunctive relief. On January 29, 2001, MSLF filed an amended complaint in which it added the Sonoran Desert National Monument to its list of challenged monuments. *See* MSLF App. at 53-54 (first amended complaint). MSLF's amended complaint also altered its causes of action slightly to allege that the creation of each of the National Monuments was "unconstitutional and *ultra vires*." *Id.* at 51-54.

The President moved to dismiss MSLF's amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant-intervenors The Wilderness Society *et al.*, a coalition of conservation, historic preservation, and archaeological organizations, also filed a Rule 12(b)(6) motion to dismiss. In the course of the briefing on the motions to dismiss, MSLF clarified that its constitutional claim alleged that the Antiquities Act is an impermissibly broad delegation of Congress's Property Clause power. The briefing also revealed that MSLF's *ultra vires* claim rested on its belief that the Antiquities Act empowers a President to create National Monuments only in order to protect man-made objects and that President Clinton acted beyond this

delegated power when he allegedly created the six National Monuments to protect natural objects. *See* App. (Plaintiffs' Opposition to Defendant's and Intervenors' Motions to Dismiss). In addition, MSLF stated explicitly and repeatedly in its briefing that it was not raising a statutory claim. *Id.* at 13 (insisting that "Plaintiffs did not raise a statutory claim ...."), 16 (declaring that "this case does not raise a statutory claim" and that "this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority ....").

On November 15, 2001, Judge Friedman granted the motions to dismiss from the bench. MSLF App. at 18-31. He held that: (1) the Antiquities Act is a valid delegation of Congress's Property Clause power to the President, *id.* at 22-23; (2) the President is entitled under the Antiquities Act to create National Monuments to protect natural objects, *id.* at 27, 28-29; (3) MSLF had not raised any statutory claims in its complaint, *id.* at 30; and (4) the Court should not look beyond the proclamations creating the Monuments because it is apparent from the proclamations that the President applied the standards set out in the Antiquities Act, *id.* at 24-29. The following day, the district court issued a written order granting the two motions to dismiss and dismissing the complaint for failing to state a claim. *Id.* at 16-17.

The district court's decision was affirmed unanimously by the D.C. Circuit on October 18, 2002. The panel held that MSLF's constitutional claim fails because "the President exercised his delegated powers under the Antiquities Act, and that statute contains intelligible principles to guide the President's action." MSLF App. at 9-10 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2000); *Dalton v. Specter*, 511 U.S. 462, 473-75 & n. 6 (1994)). The court disposed of MSLF's *ultra vires* argument that the Antiquities Act may be used to protect only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts," MSLF App. at 10, with similar dispatch. "That argument,"

the court declared, "fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." *Id.* The court also held that, to the extent MSLF's *ultra vires* argument was alleging that the President had exceeded the express limitations on presidential power set out in the Antiquities Act itself, this claim was properly dismissed because MSLF had failed to provide a single factual allegation to support such a claim. MSLF App. at 2, 10-11.

MSLF responded to the panel's decision by petitioning for rehearing *en banc*. That petition was denied on January 30, 2003. MSLF App. at 32-33.

REASONS FOR DENYING THE PETITION

I. THE PANEL CORRECTLY HELD THAT THE ANTIQUITIES ACT IS A CONSTITUTIONAL DELEGATION OF CONGRESS'S PROPERTY CLAUSE POWER.[2]

From the earliest days of the republic, Congress has delegated to the President the power to "withdraw" and

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[2] Although this constitutional argument formed the heart of MSLF's original claim in this case, it is unclear whether MSLF means to pursue it in this Court. Because MSLF's Questions Presented are less than clear on this point, The Wilderness Society *et al.* present a brief discussion of the issue. As this abbreviated presentation makes amply clear, there is no reason for this Court to take up MSLF's non-delegation argument. Indeed, it is worth noting that MSLF raised its non-delegation argument shortly after the D.C. Circuit's non-delegation decision in *Am. Trucking Ass'ns, Inc. v. Whitman*, 195 F.3d 4 (D.C. Cir. 1999), and that this argument largely fell by the wayside after this Court's unanimous reversal of that decision in *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

"reserve" public lands.[3] *See* WHEATLEY, *supra* note 3, at 54-62; GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3.04 (2000) ("The congressional Property Clause power is not exclusive: the President, when acting pursuant to delegated congressional power, can dispose of federal property."). Among the many statutes in which Congress has delegated its Property Clause power is the Antiquities Act.

Courts have explicitly recognized the Antiquities Act as a legitimate delegation of Congress's Property Clause authority. When, for example, the plaintiff argued in *Cameron v. United States*, 252 U.S. 450 (1920), that the Grand Canyon National Monument designation "should be disregarded on the ground that there was no authority for its creation," this Court disagreed, holding that the Grand Canyon is clearly an object of historic or scientific interest for the purposes of the Antiquities Act. *Id.* at 455. *See also United States v. California*, 436 U.S. 32, 36 (1978) (whether an area was included within the Channel Islands National Monument was "a question only of Presidential intent, not of Presidential power"); *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (the Antiquities Act embodies "a specific delegation of Congressional authority").

The Antiquities Act easily satisfies any constitutional delegation concerns. A Congressional delegation passes constitutional muster if it provides an "intelligible principle to which the person or body authorized to [act] is directed to

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[3] A "withdrawal" removes land from the operation of any otherwise applicable general land laws, with the ultimate disposition of the land to be determined by Congress or the executive branch. A "reservation" both "withdraws" the land and immediately dedicates the land to some special use. *See* C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC LANDS A-1 to A-2 (1969). The two terms are often used interchangeably in today's discussions of public lands laws.

conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). In the Antiquities Act, Congress provided "intelligible principle[s]" to guide the President's action by requiring that the Act be used to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and by requiring that a Monument be "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

The principles laid out in the Antiquities Act are at least as "intelligible" as many that the Supreme Court has approved. In *Whitman*, for example, the Supreme Court found the necessary "intelligible principle" in Congress's command that EPA set air quality standards "'requisite' . . . to protect the public health with an adequate margin of safety." *Whitman*, 531 U.S. at 475-76. *See also Touby v. United States*, 500 U.S. 160, 163, 165 (1991) (intelligible principle found in statute empowering Attorney General to designate a drug as a controlled substance if "necessary to avoid an imminent hazard to the public"); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 226 (1943) (finding "intelligible principle" in statutes authorizing regulation in the "public interest"). President Clinton's exercise of his power to create and reserve National Monuments, therefore, was plainly constitutional and there is no reason to review that decision further in this Court.

II. MSLF's ULTRA VIRES ARGUMENT WAS PROPERLY DISMISSED BECAUSE MSLF CAN PROVE NO SET OF FACTS THAT COULD DEMONSTRATE THAT IT IS IMPERMISSIBLE FOR A PRESIDENT TO USE THE ANTIQUITIES ACT TO PROTECT NATURAL OBJECTS OF HISTORIC AND SCIENTIFIC INTEREST.

MSLF's *ultra vires* argument asserts that President Clinton's creation of the challenged National Monuments was beyond his authority because the Antiquities Act allegedly only empowers a President to create a national monument in order to protect man-made objects. *See* MSLF App. at 10. This artifacts-only argument was rightly rejected by the D.C. Circuit and there is no reason for this Court to address the question further.

First, MSLF's artifacts-only interpretation of the Antiquities Act has been squarely rejected by the Supreme Court and others. In the very first case involving the Antiquities Act, a miner claimed that the Court should ignore the fact that the area in dispute was within the Grand Canyon National Monument because "there was no authority for its creation." *Cameron*, 252 U.S. at 455. This Court disagreed, explaining that:

> The act under which the president proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his [*i.e.*, President Roosevelt's] proclamation "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural

> wonders, and annually draws to its borders thousands of visitors.

Id. at 455-56.

This issue also arose in *Cappaert v. United States*, 426 U.S. 128 (1976), when plaintiffs argued that the addition of the Devil's Hole to the Death Valley National Monument was *ultra vires*. The President, they claimed, may use the Antiquities Act "only to protect archaeological resources." *Id.* at 141-42. This Court disagreed once again:

> [T]he language of the Act which authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government" is not so limited. The pool in Devil's Hole and its rare inhabitants are "objects of historic or scientific interest."

Id. at 142. *See also Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945) (upholding the creation of the Jackson Hole National Monument because the area contained "objects of historic or scientific interest" such as glaciers, peculiar mineral deposits, and indigenous plants and wildlife). There are many Antiquities Act issues that have not been addressed by the courts. As the foregoing demonstrates, whether the Act can be used to protect natural objects is not one of them.

Second, the text of the Antiquities Act leaves ample room for the President to create National Monuments to protect natural objects. The Act provides in relevant part that:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific

> interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments ....

16 U.S.C. § 431 (emphasis added). While Congress's reference to "historic and prehistoric structures" presumes that those objects are man-made, the catch-all phrase "other objects of historic or scientific interest" contains no such presumption.

Third, Congress's inaction in the face of visible executive practice interpreting the Antiquities Act "constitutes persuasive evidence that that interpretation is the one intended by Congress." *Zemel v. Rusk*, 381 U.S. 1, 11 (1965). As the D.C. Circuit has said, "the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting Congressional reversal, it is entitled to great respect." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (internal quotation omitted). Such respect is particularly appropriate when Congress has considered legislation concerning the statute without changing the provision in question. *See, e.g., id.* at 795-96 (concluding that where Congress was aware of the President's contested interpretation of a statute and nevertheless renewed the statute without significant modification, "[i]n this context, a court could only in the most extreme case find that the Executive has violated the statute").

Presidents have created more than 100 National Monuments since 1906, many of which were created to protect natural objects. *See* 16 U.S.C.A. § 431 (list of national monuments). Although some of the Monuments encompassed millions of acres and were the subject of significant controversy, Congress has never indicated that the creation of the Monuments was beyond the President's Antiquities Act power. That Congress has had the opportunity to do so is undeniable. For example, when

Congress passed the Federal Land Policy and Management Act of 1976, it repealed the President's withdrawal authority under 29 existing statutes. *See* Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976). Congress, though, intentionally left the President's Antiquities Act withdrawal authority intact. *See* H.R. Rep. No. 94-1163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6203 ("The bill would repeal . . . all identified withdrawal authority granted to the President or the Secretary of Interior. The exceptions, which are not repealed, are contained in the Antiquities Act" and three other statutes.).[4]

National Monuments have been created to protect natural objects for nearly a century. Those Monuments have affected millions of acres, spawned Supreme Court decisions, and been the subject of Congressional scrutiny and complaint. Nonetheless, Congress has never contested the President's ability to create National Monuments for that purpose. This silence marks a paradigmatic example of Congressional acquiescence.

Fourth, in any event, President Clinton created the six National Monuments in order to protect man-made as well as natural objects. For example, the President's proclamation creating the Canyon of the Ancients National Monument in

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[4] Further evidence of Congressional acquiescence can be seen in past Antiquities Act legislation, none of which contested the President's authority to use the Act to protect natural objects. This is particularly telling in the case of Congress's response to President Roosevelt's creation of the Jackson Hole National Monument. Although that Monument was the subject of a court challenge that confirmed the President's ability to create National Monuments to protect natural objects, *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945), Congress did not respond by restricting or contesting that ability. Instead, it only limited the President's authority to enlarge or create National Monuments in Wyoming. *See* 16 U.S.C. § 431a.

Colorado announces in its very first sentence that it is motivated by the fact that the area "[c]ontain[s] the highest known density of archaeological sites in the Nation, ... [and that] the Monument offers an unparalleled opportunity to observe, study, and experience how cultures lived and adapted over time in the American Southwest." MSLF App. at 65. *See also* App. at 81 (describing archaeological resources within Hanford Reach Monument), 58-60 (archaeological and historic resources within the Grand Canyon-Parashant Monument), 86-87 (same within Ironwood Forest Monument), 91-93 (archaeological and historic sites within Sonoran Desert Monument), 73-74 (portions of historic Oregon/California Trail in Cascade-Siskiyou Monument). Therefore, even if the Antiquities Act could not be used to establish National Monuments to protect natural objects, as MSLF asserts, there is no reason for this Court to take up that issue here because the six National Monuments at issue were established to protect man made objects as well.

III. THE LEVEL OF JUDICIAL REVIEW FOR STATUTORY CLAIMS UNDER THE ANTIQUITIES ACT IS NOT A QUESTION PROPERLY BEFORE THIS COURT.

MSLF spends the bulk of its petition arguing that the decision below must be reversed and that MSLF must be given the opportunity on remand to carry out discovery in order to determine whether "the president has acted in full compliance with the legislative commands contained in the" Antiquities Act. MSLF Pet. at 16. *See also id.* at 10-11 (discovery necessary in order to explore MSLF's claims), 14 (court must determine whether there has been full "compliance with statutory limitations on authority"). The fundamental flaw in MSLF's position is that, in fact, MSLF's complaint did not challenge the creation of the National Monuments on statutory grounds. *See* MSLF App. at 51-54 (alleging only that the creation of each Monument

was unconstitutional and *ultra vires*). Indeed, there is not a hint in MSLF's complaint that it was challenging President Clinton's failure to abide by any particular statutory limitation in the Antiquities Act.

MSLF argues strenuously that its *ultra vires* claim should not have been dismissed because the parties and the district court all understood MSLF was making an *ultra vires* argument. MSLF Pet. at 7-9. MSLF is certainly quite right that the parties and district court understood that MSLF was making an *ultra vires* claim; this claim is plain from the face of the complaint. Where MSLF is absolutely mistaken, however, is in its assumption that presidential action that violates a statutory provision is, *ipso facto*, *ultra vires* the President's delegated authority. What MSLF fails to appreciate is that statutory, *ultra vires*, and constitutional claims are distinct, non-fungible categories. Judge Friedman appreciated this distinction when he pointed out in his ruling from the bench that:

> In looking at whether a complaint should be dismissed on failure to state a claim . . . one has to look at the face of the complaint, and despite some of the arguments that [MSLF's counsel] Miss Koehler made this afternoon, I think it is accurate having looked at the amended complaint . . . to say that the plaintiff really hasn't made factual claims that should require a trial and discovery. She made constitutional claims.

MSLF App. at 30 (emphasis added).

The distinction between statutory and *ultra vires* claims is firmly rooted in Supreme Court precedent. In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the leading case on this topic, a corporation sued the War Assets Administration for allegedly failing to comply with a coal contract. *Id.* at 684. In response to the government's sovereign immunity defense, the corporation, like MSLF in

this case, argued that illegal actions are necessarily *ultra vires* and not the actions of the sovereign because the sovereign is never authorized to act illegally. *Id.* at 692-93.

The Court rejected this argument and distinguished *ultra vires* actions for which there is no delegated power, from illegal actions resulting from the improper exercise of delegated power. Because the Administrator in *Larson* was empowered to enter into contracts, this Court said, a challenge to his adherence to a contract could not be an *ultra vires* claim. "There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program . . . ." *Id.* at 692. *See also id.* at 693 (even if the Corporation had established that the Administrator had breached the contract, this would not make out an *ultra vires* claim because it would not "establish that the officer, in committing that wrong, is not exercising the powers delegated to him . . . ."). As the Court put it succinctly, an action is *ultra vires* when there is a "lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Id.* at 690.

Courts since *Larson* have continued to distinguish between *ultra vires* and illegal actions. For example, in *Pennhurst State School Dist. & Hospital v. Halderman*, 465 U.S. 89 (1984), this Court held that an officer "may be said to act *ultra vires* only when he acts 'without any authority whatever.'" *Id.* at 102 (quoting *Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670, 697 (1982)).[5]

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[5] This Court has also made clear that statutory claims do not necessarily raise constitutional issues. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994) ("every action by the President, or by

When President Clinton established the six Monuments, he was, like the Administrator in *Larson*, acting pursuant to a congressionally delegated power. *See supra* at 6-7; MSLF App. at 62, 69, 74, 82, 87, 94 (proclamations for each Monuments declaring that they were being created pursuant to the Antiquities Act). Therefore, any claim that he violated the statutory limitations in the Antiquities Act is a statutory rather than an *ultra vires* claim.[6] Because the statutory claims that MSLF refers to in its petition are not within the bounds of the *ultra vires* and constitutional claims presented in its complaint, MSLF's arguments regarding the pleading standard for statutory claims or the need for a probing factual review to assess any statutory violations by the President are not germane to this case and so cannot support a petition for writ of certiorari.

IV. EVEN IF MSLF'S *ULTRA VIRES* CLAIM IS REINTERPRETED ON APPEAL AS A STATUTORY CLAIM, SUPREME COURT REVIEW IS UNWARRANTED BECAUSE A CLAIM IS PROPERLY DISMISSED WHEN A PLAINTIFF FAILS TO STATE ANY FACTUAL GROUNDS FOR A CLAIM.

Even if MSLF's *ultra vires* claim is understood somehow to raise a statutory challenge, further review would be

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another elected official, in excess of his statutory authority is not *ipso facto* in violation of the Constitution"), 474 n.6 ("in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no 'constitutional question whatever' is raised . . . . Rather, 'the cases concern only issues of statutory interpretation.'" (Citation omitted.)

[6] MSLF's argument that Congress meant the Antiquities Act to be used solely to protect human artifacts presents an *ultra vires* claim because it goes to the nature rather than the exercise of the President's delegated powers. *See* text *supra* at 8-12 (explaining why this *ultra vires* claim must fail).

inappropriate because the appellate court correctly held that a claim should be dismissed when the plaintiff fails to provide any factual grounds for the claim in its complaint. MSLF's argument that the D.C. Circuit applied a heightened pleading standard to MSLF's complaint misreads the panel's decision and misunderstands the notice pleading requirement and so cannot possibly justify review by this Court.

Contrary to MSLF's characterization of the D.C. Circuit's decision, the court did not require MSLF to "allege all the facts necessary to prove its claim." MSLF Pet. at 13 (emphasis added). Rather, the court refused to consider any statutorily based claim raised by MSLF because MSLF had "failed to present any factual allegation sufficient to warrant review ...." MSLF App. at 2 (emphasis added). *See also id.* at 10 ("At no point has Mountain States presented factual allegation that would occasion further review of the President's actions."). The question then, is not whether a plaintiff must allege every single fact in support of a claim, but instead whether a plaintiff must include any factual allegation. By holding that a plaintiff must provide some factual allegation in support of its claim, the D.C. Circuit acted squarely within the bounds of this and every other court's pleading jurisprudence.

The Antiquities Act contains several restrictions on the president's use of the Act; the president may use the Act only to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and must ensure that any Monument be "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. In order to make out a claim that the president violated any of these restrictions, MSLF would have had to allege at least some facts indicating that the National Monuments were created to protect objects that lack "scientific or historic interest," or that the Monuments are too large to protect the objects to be protected. MSLF did neither of these. *See* MSLF App. at

35-55 (complaint). There is not a single mention of these restrictions in MSLF's complaint. Nor, for that matter, is there even any mention of the Antiquities Act itself.[7]

This Court and others have held that, even under the liberal notice pleading rules, a plaintiff must provide some factual allegations in support of its legal claims. For example, in *Conley v. Gibson*, 355 U.S. 41 (1957), the case upon which MSLF principally relies, this Court made clear that, in addition to describing the legal claim being made, a plaintiff must set forth "the grounds upon which it rests." *Id.* at 47. The failure to include such factual allegations, this Court has ruled, leaves a claim subject to dismissal. In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), for example, this Court held that a union's complaint should be dismissed because it failed to allege facts that that would demonstrate that the employer association had committed the antitrust violations claimed by the union. Although the Court acknowledged that it "must assume that the Union can prove the facts alleged in its complaint," dismissal was appropriate because it is not "proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Id.* at 526.

Numerous courts of appeal have followed suit. *See, e.g.*, *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 222 (4th Cir. 1994) (complaint must provide "sufficient

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[7] MSLF's briefing below demonstrated below that this was no accident. MSLF stated repeatedly in the district court that it was not raising a statutory challenge to President Clinton's creation of the National Monuments. *See* App. at 13 (insisting that "Plaintiffs did not raise a statutory claim ...."), 16 (declaring that "this case does not raise a statutory claim" and that "this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority ....").

facts so that each element of the alleged antitrust violation can be identified"); *Perkins v. Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) (affirming the dismissal of a claim under Rule 12(b)(6) because the plaintiffs had failed "to identify the grounds upon which their claims are based" and, citing *Conley*, holding that "[t]hey must do so, even under the liberal notice pleading of Rule 8(a)"); *Municipal Util. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1501 (11th Cir. 1991) (quotation and citation omitted) ("[c]onclusory allegations will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief"); *Jones v. Community Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (citations omitted) (affirming the Rule 12(b)(6) dismissal of a complaint that contained only "conclusionary allegations, unsupported by facts"); *Kadar Corp. v. Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) (citations and quotations omitted) (affirming the dismissal of a claim for which plaintiff had failed to provide sufficient factual support, explaining that a plaintiff must provide factual allegations that "outline the elements" of its claim and that "[m]ore detail is required than a plaintiff's bald claim that he has a valid claim of some type").[8]

Courts have likewise rejected MSLF's suggestion that the notice pleading rules allow a plaintiff to file a complaint

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[8] Federal practice treatises are in accord. *See* 2 MOORE'S FEDERAL PRACTICE, § 8.04[2] (Matthew Bender 3d ed.) ("Sufficient factual allegations must be pleaded along with conclusions of law to give fair notice to the opposing party."); 1 RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE 353 (5th ed. 1998) (under Rule 8(a), "The statement of a claim" must include "factual descriptions of events which are then shown to fit the language of the legal rule invoked"); 1 MOTIONS IN FEDERAL COURT 323 (3d ed. 1996) ("To survive a motion under FRCP 12(b)(6), a complaint" must, among other things "pinpoint[] the time, place, and circumstances" of the event that gave rise to the claim).

that is devoid of facts and then use discovery to search for the facts to support its claims. MSLF Pet. at 10-13. In *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975), for example, a plaintiff alleged that the executives of a private university had acted under color of state law within the meaning of 42 U.S.C. § 1983 when they allegedly discriminated against a female faculty member. The court found that the facts set forth in the faculty member's complaint did "not support the conclusion that defendants acted under color of state law in their discrimination" against her. *Id.* at 827. Like MSLF in this case, the plaintiff in *Cohen* argued that "since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal" the necessary facts to support her claim. *Id.* The 7th Circuit soundly rejected such a fishing expedition. "We agree," the court wrote, "that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made." As another court noted when it rejected a similar discovery request:

> Before filing the complaint, counsel had the obligation to determine that the complaint was "well grounded in fact." Fed.R.Civ.P. 11. Consequently, it was not asking too much to require plaintiff to disclose some relevant facts and basis for them before the requested discovery would be allowed.

MacKnight v. Leonard Morse Hosp., 828 F.2d 48, 52 (1st Cir. 1987) (quoting statement in 4 Moore's Federal Practice § 26.56[1] at 26-95 n.3 that "discovery cannot be used as a vehicle for discovering a right of action").

None of the cases cited by MSLF in its petition support MSLF's view that notice pleading dispensed with the need to

provide any factual support for a claim. MSLF relies in large part upon *Conley v. Gibson*, 355 U.S. 41 (1957). MSLF Pet. at 7, 11, 13. As noted above, however, that case states explicitly that in addition to describing the legal claim being made, a complaint must set forth "the grounds upon which it rests." *Id.* at 47.

MSLF's reliance upon *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), is similarly unjustified. This Court held in that case that a complaint in an employment discrimination case need not allege facts constituting a prima facie case of discrimination. *Id.* Such a requirement, this Court explained, would conflict with the notice pleading requirement of Rule 8(a). *Id.* at 512. Whether or not a complaint must make out a prima facie case is not an issue in the instant case, however, because the court below imposed no such stringent requirement. Rather, the D.C. Circuit merely held that a complaint will fail if it contains no factual allegations in support of a claim. MSLF App. at 2, 10-11. Furthermore, rather than supporting MSLF's fact-free interpretation of Rule 8(a), *Swierkiewicz* undermines it by stating repeatedly that a complaint must set out the factual grounds upon which a plaintiff rests its claims. *Swierkiewicz*, 534 U.S. at 512, 514.[9]

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[9] The remaining cases cited by MSLF are similarly unsupportive of MSLF's cause. *See Leatherman v. Tarrant Cty. Narcotics Intelligence Coord. Unit*, 507 U.S. 163 (1993) (cited at MSLF Pet. at 13) (rejecting a "heightened pleading standard" because it conflicted with the Rule 8(a), which nonetheless requires a plaintiff to set out the grounds upon which its legal claim rests); *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978) (cited at MSLF Pet. at 10, 11) (discovery dispute in class action, which dispute had nothing whatsoever to do with the notice pleading requirements of Rule 8(a)); *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (cited at MSLF Pet. at 12) (factual allegations in plaintiff's complaint were sufficient to evade a Rule 12(b)(1) dismissal on Eleventh Amendment immunity grounds).

Finally, the fact that MSLF failed to include a single factual allegation in its complaint to support a claim that President Clinton's creation of the six National Monuments violated any statutory restriction in the Antiquities Act was not some mere oversight on MSLF's part. When MSLF filed its amended complaint, it was not trying to invalidate the National Monuments on the grounds that they were too large or that the objects within the Monuments were unworthy of protection. MSLF was after much larger game in this case. As their briefing below made clear, MSLF was trying to undermine the very foundation of the Antiquities Act by arguing that the Act itself was an unconstitutional delegation of Congress's Property Clause power. Failing that, MSLF was trying to sharply limit the use of the Antiquities Act by establishing that the Act could be used only to protect man-made objects. Both of these claims present purely legal issues that were perfectly suited for dismissal. There is no reason for this Court to consider their dismissal further.

CONCLUSION

MSLF presents no legitimate reason for this Court to review the D.C. Circuit's decision in this case. The Petition for a Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOUNTAIN STATES LEGAL FOUNDATION, On Behalf of Its Members, and THE BLUE RIBBON COALITION, On Behalf of Its Members, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, In His Official Capacity as President of the United States, Defendants, and THE WILDERNESS SOCIETY, *et al.*, Defendant-Intervenors	Civ.No.:1:00CV02072 PLF **PLAINTIFFS' OPPOSITION TO DEFENDANT'S AND INTERVENORS' MOTIONS TO DISMISS**

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INTRODUCTION

On January 26, 2001, Mountain States Legal Foundation ("MSLF") and the Blue Ribbon Coalition ("BRC") (collectively, "MSLF"), filed Plaintiffs' First Amended Complaint on behalf of their members challenging, as violations of the Property Clause, Defendant's creation of six national monuments by proclamation. MSLF challenges the designation of six national monuments: the Grand Canyon-Parashant in northwestern Arizona, the Canyons of the Ancients in southwestern Colorado, the Cascade-Siskiyou in southwestern Oregon, the Hanford Reach in south central Washington, the Ironwood Forest in south central Arizona, and the Sonoran Desert in southern Arizona.

On March 26, 2001, Defendant moved to dismiss MSLF's first amended complaint, alleging that Defendant acted pursuant to authority provided by the Antiquities Act of 1906, 16 U.S.C. § 431, and that MSLF's complaint fails to satisfy standing requirements with regard to the Sonoran Desert National Monument. ON the same day, Intervenors filed a separate motion to dismiss. However, for the reasons set forth below, MSLF's first amended complaint may not be dismissed.

I. MSLF HAS DEMONSTRATED STANDING FOR THE MOTION TO DISMISS STAGE, TO CHALLENGE THE SONORAN DESERT NATIONAL MONUMENT.

The Supreme Court has set forth the requirements to prove Article III standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between

> the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations omitted). The burden on a plaintiff at the pleading stage is to "allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin,* 422 U.S. 490, 518 (1975).

A. MSLF Has Alleged Injury In Fact And Causation Sufficient For The Motion To Dismiss Stage.

Because MSLF' complaint contains allegations of concrete and particularized injury and because these allegations must be taken as true at this stage, MSLF's complaint satisfies the injury in fact requirement of standing for purposes of defeating a motion to dismiss.[10] At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. MSLF's complaint contains the requisite "general factual allegations of injury resulting from the defendant's conduct."

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[10] It is noted that Defendant does not challenge the organization standing of MSLF and BRC if organization members can meet the standing requirements. Nor does Defendant challenge the standing of MSLF and BRC members to challenge the other five monuments designated by Defendant.

MSLF's complaint alleges that its members have in the past used, and have "concrete plans" for the future to use, each of the six areas of federal lands described in the complaint—including the Sonoran Desert National Monument—for many purposes, purposes that are now barred by Defendant's conduct, including, but not limited to:

> Prospecting for minerals, exploring for and mining for ore bodies, exploring for and drilling for oil and gas deposits, hunting, fishing, camping or otherwise recreating, grazing livestock, harvesting timber, obtaining access to repair, upgrade or replace power transmission lines and facilities, obtaining access to private property or state-owned property, maintaining equipment, and for other lawful uses.

First Amended Complaint ¶ 5. MSLF's complaint also alleges that members of BRC have used the federal lands described in the complaint—including those encompassed within the Sonoran Desert National Monument—and plan to continue to access those federal lands for recreational purposes, recreational purposes that are now prohibits by Defendant's conduct. Complaint ¶ 26.

Furthermore, the complaint alleges that Defendant's conduct in issuing the Proclamation creating the Sonoran Desert National Monument has an immediate *de facto* effect upon and interferes with these myriad activities and uses of those federal lands. Complaint ¶¶ 42, 75-80.

Therefore, MSLF's complaint sufficiently alleges previous uses of the Sonoran Desert Monument area by members of MSLF and BRC and present and imminent injury to those uses directly caused by Defendant's conduct in designating those lands as a national monument.

Although MSLF will be required, at a later stage in this case, to set forth specific evident of Plaintiffs' injury, allegations of injury suffice at the motion to dismiss stage.

Lujan, 504 U.S. at 561. To require MSLF to set forth in its complaint facts specifically describing individual members' uses of the lands and the impacts on such uses caused by Defendant's monument designations eviscerates the notice pleading standard provided by Rule 8 of the Federal Rules of Civil Procedure and creates a direct conflict with the holding of the Supreme Court in *Lujan*.

B. MSLF Can Demonstrate The Existence Of Those Specific Facts Necessary To Support The Claim.

Although not necessary at this stage of the proceedings, MSLF has demonstrated the existence of the specific facts necessary to support the claim of injury, as required by *Lujan*, at the summary judgment state.[11] *Lujan*, 504 U.S. at 561. MSLF had attached declarations of SLF and BRC members detailing immediate and continuing injuries occurring in the Sonoran Desert Monument area to recreational and propriety interests,[12] McKinley Declaration (Decl.), Exhibit (Exh.) 1; and grazing, ranching and property maintenance interests, Utz Decl., Exh. 2.[13]

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[11] Contrary to Defendant's assertion, *see* Defs. Statmt. Of Pts. At 11, it is at the summary judgment stage, not the motion to dismiss state, that plaintiffs must describe specific "concrete plans." *Lujan*, 504 U.S. at 562, 564. Rather, on a motion to dismiss, the more general allegation of "concrete plans" is sufficient. *Id.* At 561.

[12] The injury arising from the "concrete plans" to use the federal lands and the present inability to fulfill those plans is an immediate injury as well as a future injury. *See* Defs Statmt. Of Pts at 11.

[13] The mere fact that the Proclamations purport not to affect valid existing rights does not prevent members of MSLF or BRC from being injured regarding a variety of activities and uses of the federal lands.

Because the allegations of injury and causation in the complaint and all supporting affidavits must be taken as true at the motion to dismiss stage, *O'Donnell v. Barry,* 148 F.3d 1126, 1130 (D.C. Cir. 1998), MSLF had sufficiently demonstrated injury in fact and causation beyond what is necessary for the purposes of surviving a motion to dismiss on standing with regard to the Sonoran Desert Monument.

II. THIS COURT HAS JURISDICTION TO REVIEW WHETHER THE PRESIDENT ACTED WITHIN THE SCOPE OF CONSTITUTIONAL AUTHORITY DELEGATED BY CONGRESS IN THE ANTIQUITIES ACT.

Defendant argues that this Court has no jurisdiction to review Defendant's designation of the challenged national monuments. Defs. Stmt. Of Pts. At 18. Defendant proposes to limit the jurisdiction of this Court to consideration of whether the Antiquities Act represents a permissible delegation of congressional authority to the President. Defs. Stmt. Of Pts. At 19. According to Defendant, this Court may not review Defendant's actions to ensure that Defendant has complied with the limits that Congress placed on the delegation of its constitutional authority "to make all needful rules and regulations" regarding federal lands. Defs. Stmt of Pts. At 19, 21-25.

Contrary to Defendant's arguments, it is the proper function and duty of this Court to review the actions of the Executive to ensure its compliance with the constitutional limits imposed upon it. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 582 (1952)("The President's power...must stem either from an act of Congress or from the Constitution itself."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949).

In *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), the Supreme Court expressly recognized that "the President's actions may still be reviewed for constitutionality."[14] Moreover, the Supreme Court recognized the continuing applicability of this principle in *Dalton v. Specter*, 511 U.S. 462, 473-474 (1994).

Judicial review in this case is necessary in order to determine whether Defendant acted in violation of the Property Clause by reserving federal lands as national monuments contrary to the authority delegated to him by Congress in the Antiquities Act. Because such a determination necessarily presents a constitutional question, it constitutes a proper exercise of the jurisdiction of this Court.

A. This Court Has Jurisdiction To Review The President's Actions To Ensure That The Will of Congress Has Been Obeyed In The Designation Of National Monuments Pursuant To The Antiquities Act.

1. The purpose of requiring that Congress provide intelligible principles to guide the execution of delegated authority is to permit courts to determine whether the will of Congress has been obeyed.

The Supreme Court explained in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212,218 (1989), that the purpose of requiring that Congress provide "intelligible principles" to guide the exercise of delegated authority is to permit a court to "ascertain whether the will of congress has been obeyed."

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[14] The Supreme Court held in *Franklin* that the President's actions are not reviewable for abuse of discretion under the Administrative Procedure Act (APA). Plaintiffs have not pleaded the APA nor do Plaintiffs seek judicial review of Defendant's action under the APA. *See* First Amended Complaint.

See also, Touby v. United States, 500 U.S. 160, 168 (1991) (quoting *Skinner*); *American Power & Light Co. v. Securities & Exch. Comm'n,* 329 U.S. 90, 105 (1946) ("Private rights are protected by access to the courts to test the application of the [general congressional] policy in the light of these legislative declarations."); *Yakus v. United States,* 321 U.S. 414, 425 (1944) (delegation must "sufficiently mark[] the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will"). Whether the discretion of the delegate is "confined within a narrow or broad range," "the only concern of courts is to ascertain whether the will of Congress has been obeyed." *Yakus,*321 U.S. at 425.[15]

In *Panama Refining Co. v Ryan*, 293 U.S. 388, 432 (1935), the Supreme Court recognized the "wholesome and necessary principle" that the official acting pursuant to a congressional delegation of legislative authority must "show a substantial compliance" with the procedures and rules prescribed by Congress within the delegation in order to "give validity" to the exercise of authority pursuant to that delegation. Thus, the issuance of an order pursuant to a delegation must rest upon the required finding of facts or condition; if such a finding is lacking, "the order is ineffective." *Id.* Furthermore:

> We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the *constitutional restriction* applicable to such a delegation.

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[15] In fact, Justice Marshall restated the holding of the majority in *Touby*: "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby*, 500 U.S. at 170 (Marshall and Blackmun, JJ., concurring).

Id. at 433 (emphasis added)

Therefore, the determination of whether the President acted within the bounds provided by Congress the Antiquities Act is the epitome of a question of "constitutional restriction, which is properly within the jurisdiction of this Court *Youngstown Sheet & Tube,* 343 U.S. at 585, 587-588.

2. *Dalton v. Specter* is inapposite to this case.

Defendant cites *Dalton* in support of its argument that this Court has not jurisdiction to review whether Defendant acted within the scope of the congressional authority delegated to him by the Antiquities Act. Defs. Stmt. Of Pts. At 21. But *Dalton* is inapposite to this case for two reasons.[16]

First, *Dalton* involved a purely statutory and not a constitutional claim. *Dalton*, 511 U.S. at 474. The plaintiffs in *Dalton* pleaded no constitutional claim against the President. *Dalton,* 511 U.S. at 478 (concurring opinion). Because Plaintiffs in this case have plead a constitutional claim, *Dalton* does not apply.

Dalton stands for the proposition that judicial review of the President's actions based on a statutory claim is not available under the general constitutional notion of separation of powers; instead that review must be based on a separate, specific constitutional claim. *Dalton,* 511 U.S. at 473-474. In *Dalton*, the plaintiffs brought their cause of action under the APA, alleging that the President exceeded his authority under the Defense Base Closure and

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[16] Moreover, Defendants rely solely on *dicta* in the *Dalton* decision because the President was not a defendant in that case. *Dalton*, 511 U.S. at 467; 511 U.S. at 478 (Souter, Blackmun, Stevens, and Ginsbug, JJ., concurring).

Realignment Act of 1990 by accepting procedurally flawed base closure recommendations. *Id.* at 469, 474. Because the Supreme Court's decision in *Franklin* clearly precluded review of presidential action under the APA, the Court of Appeals sought to determine whether review was otherwise available. *Dalton*, 511 U.S. at 471. The Court of Appeals determined that constitutional review was available: "there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine." *Id.* However, the Supreme Court reversed, rejecting the Court of Appeal's reasoning that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation of powers doctrine. *Id.* at 473-474 ("the claim raised here is a statutory one").

Dalton is the inapposite to this case because Plaintiffs did not raise a statutory claim, but instead raised a constitutional claim based on the Property Clause. *See* First Amended Complaint, ¶¶ 81-104. It is Defendant and Intervenors who raise the Antiquities Act as a basis for Defendant's actions. Defs. Stmt. Of Pts. At 1; Interv. Memo. at 1. Plaintiffs assert in response that the Antiquities Act does not provide a constitutional basis for Defendant's actions because Defendant, in designating the challenged monuments, exceeded the scope of the authority delegated to him by the Antiquities Act. Defendant's actions are therefore unconstitutional because they "stem [n]either from an act of Congress [n]ot from the Constitution itself." *Youngstown Sheet & Tube*, 343 U.S. at 585. Because the authority to manage federal lands is specifically granted to Congress via the Property Clause, Defendant's unauthorized actions in reserving more than two million acres of federal land violate the Property Clause.

Therefore, because Plaintiffs' constitutional claims are based not on a statutory claim or on a general "constitutional aspect...grounded in the separation of powers doctrine," as in *Dalton*, but rather are based specifically and solely on the

Property Clause, Plaintiffs' constitutional claims are judicially reviewable. *See Dalton*, 511 U.S. at 474 (recognizing "[t]he distinction between claims that an official exceeded his statutory authority, on the other hand, and claims that he acted in violation of the Constitution, on the other.").

Second, *Dalton* does not abrogate the authority of courts, in response to an alleged constitutional violation, to conduct judicial review of discretionary presidential action. Upon determining that the "exception identified in *Franklin* for review of constitutional claims" was inapplicable in *Dalton*, the Supreme Court examined whether the plaintiffs' statutory claims were otherwise reviewable outside the APA. *Dalton*, 511 U.S. at 474. The Court concluded that statutory review of the President's action, outside the APA and absent a constitutional claim, was not available "when the statute in questions commits the decision to the sole discretion of the President." *Id.* Because the plaintiffs' claim in *Dalton* was "not a constitutional claim, but a statutory one," the language of the statute committing the action to the discretion of the President rendered the President's action nonreviewable. *Id.* at 476-477. Thus, the statutory commitment of a decision to the President's discretion does not preclude judicial review where a constitutional claim is at stake. *See id.* at 274 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397 (1971), distinguishing between "actions contrary to [a] constitutional prohibition" and those "merely said to be in excess of the authority delegated...by the Congress").

In fact, the concurring opinions in *Dalton* emphasize that this distinction by the Court specifically preserved the authority of the federal judiciary to review constitutional claims involving authority delegated by statute. Justice Blackmun understood the majority's holding not to preclude a constitutional challenge to an *ultra vires* exercise of the President's authority. *Dalton*, 511 U.S. at 478 (Blackmun, J., concurring). In addition, Justice Blackmun more

specifically described the type of *ultra vires* claim that would not be foreclosed by the majority's decision, writing that judicial review would not be foreclosed of a claim "that the President added a base to the Defense Base Closure and Realignment Commission's list in contravention of h is statutory authority." *Id.* Justice Souter agreed, joining that portion of the majority's opinion "because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Bar Closure and Realignment Act of 1990." *Id.* (Souter, J., concurring, joined by Justices Blackmun, Stevens, and Ginsburg).

Therefore, *Dalton* does not preclude judicial review of *ultra vires* presidential action where that action was completely outside the realm of discretion afforded by the statutory delegation. Rather *Dalton* precludes review of claims based simply on an alleged abuse of the discretion occurring within the confines of the delegation. In other words, *Dalton* precludes claims based on abuse of discretion but does not preclude claims based on the absence of constitutional authority. Contrary to Defendant's arguments, Defs. Stmt. Of Pts. At 21, the *Dalton* case in no way abrogates the jurisdiction of courts to determine whether discretionary action by the President violates his constitutional authority. *See Dalton*, 511 U.S. at 474.

Other cases cited by Defendant, which were cited by the Court in *Dalton* as well, bear out this distinction. In *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919), the Supreme Court held that where the plaintiffs' claims concerned "not a want of [Presidential] power, but a mere excess of abuse of discretion in exerting a power give, it is clear that it involves considerations which are beyond the reach of judicial power." *See Dalton*, 511 U.S. at 474. In *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940), the Supreme Court held that where there was no question that the President "acted in full conformity with the statute," "[n]o question of law is raised when the exercise of

his discretion is challenged." Similarly, in *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 112-114 (1948), the President's discretionary decision within the confines of the statutory scheme was not reviewable.

Dalton provides that when a statute commits a decision or determination to the discretion of the President, the exercise of the discretion is not reviewable for a simple abuse of that discretion. However, *Dalton* does not preclude review of *ultra vires* presidential actions where the President's failure to act within the outer limits of the delegated authority renders the action of the President without constitutional authority. The absence of constitutional or statutory authority for presidential action remains an issue fully addressable by the courts. *Youngstown Sheet & Tube*, 343 U.S. at 582.

Because this case does not raise a statutory claim, but rather is based upon whether or not Defendant complied with a specific constitutional provision, *i.e.*, the Property Clause, in designating the challenged national monuments, *Dalton* is inapposite. Furthermore, because this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority, *Dalton* is inapposite. This Court has jurisdiction to review Plaintiffs' constitutional claims.

B. This Court Has Jurisdiction To Determine Whether There Is Substantial Evidence To Support The President's Exercise Of The Constitutional Authority Delegated To Him By Congress.

Defendant cites *State of Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945), in support of its argument that Defendant's designation of a national monument under the Antiquities Act constitutes an act of unreviewable discretion. However, *Franke* actually stands for the opposite conclusion. In *Franke*, the State of Wyoming challenged President

Roosevelt's designation of the Jackson Hole National Monument. *Id.* at 892. Like Plaintiffs here, Wyoming asserted, *inter alia*, that the Proclamation creating the monument was without constitutional authority. *Id.* The State also sought invalidation of the Proclamation as outside the scope and purpose of the Antiquities Act because the monument area contained no objects of historic or scientific interest and because it was not confined to the smallest area compatible with the proper care and management of such objects. *Id.*

The court in *Franke* explicitly recognized its jurisdiction to consider whether the President acted outside the scope of the constitutional authority conferred by the Antiquities Act:

> [T]his Court feels that it has a limited jurisdiction to investigate and determine whether or not the Proclamation is an arbitrary and capricious exercise of power under the Antiquities Act so as to be outside the scope and purpose of that Act by which the President in the exercise of its provisions has exceeded or violated a discretion thereby conferred.

Id.

The *Franke* case demonstrates that actions taken pursuant to delegated legislative authority may be reviewed to the extent necessary to ensure that the delegate constitutionally acted within the scope of authority conferred by the delegating statute. Only after concluding that there was a substantial basis in the evidence for the President's establishment of the Jackson Hole National Monument did the district court hold that "under the evidence presented here, the Court cannot interfere." *Franke*, 58 F. Supp. At 896.

The Supreme Court, in *National Broadcasting Co. v. United* States, 319 U.S. 190, 224 (1943), held that the federal judiciary plays its proper role when it determines whether an

exercise of discretion pursuant to delegated authority is lawful. Describing its role in reviewing regulations promulgated by the FCC pursuant to a congressional delegation, the Supreme Court held that the extent of its duty was to determine whether the action of the FCC was based upon "findings supported by evidence" and not the "public interest will be furthered or retarded by the [regulations]." *Id.*

Therefore, this Court may review the factual evidence regarding Defendant's designation of the challenged national monuments in order to determine whether Defendant acted consistently with the grant of congressional authority contained in the Antiquities Act. However, a review of the factual evidence regarding Defendant's designation of the challenged national monuments is a question of fact that is not properly decided on a motion to dismiss. *City Federal Sav. and Loan Ass'n v. Crowley*, 393 F. Supp. 644, 658 (E.D. Wis. 1975).

III. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. Standard of Review

Defendant and Intervenors move to dismiss this case pursuant Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Defs. Mot. To Dismiss at 1; Interv. Mot. To Dismiss at 1. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1117 (D.C. Cir. 2000).

B. If the Antiquities Act Is Construed As A Delegation Of Unlimited Power Such That All Actions By A President Are Committed To His Unreviewable Discretion, The Act Is

Unconstitutional Under The Non-Delegation Doctrine.

Defendant asserts that Defendant's exercise of discretion in creating the challenged monuments is not judicially reviewable because the Antiquities Act commits the designation of national monuments to the complete and total discretion of Defendant Defs. Stmt. Of Pts. At 21. To the degree that this assertion by Defendant is true, the Antiquities Act violates the nondelegation doctrine.[17]

It is well settled that a delegation of legislative authority with no standards or limits is unconstitutional. *Panama Refining*, 293 U.S. at 430; *Yakus*, 321 U.S. at 426. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art I, § 1. It is from this language that the Supreme Court has derived the nondelegation doctrine, which provides that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165 (1991). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)).

Although the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limited, from the other branches of government, in order to do so, Congress must "lay down by legislative act an intelligible principle to which the person authorized to [act] is directed to conform." *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). Thus, a delegation of authority by a statute that fails to supply such an "intelligible

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[17] Defendant concedes that this Court has jurisdiction to review the constitutionally of the Antiquities Act under the nondelegation doctrine. Defs. Stmt. Of Pts. At 16-17.

principle" is an unconstitutional delegation of legislative authority. *Id.*[18]

1. The Antiquities Act improperly delegated to the President all powers possessed by Congress.

To the extent that Defendant argues that Defendant's exercise of discretion under the Antiquities Act is judicially unreviewable, Defendant asserts that the Antiquities Act is without limits. Because Defendant asserts that the Antiquities permits Defendant to designate any federal land as a national monument, the Antiquities Act violates the nondelegation doctrine because it improperly delegates to the President all the power possessed by Congress as to federal lands.[19] This Congress may not do.

Although Congress may delegate its power by "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply," *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), that delegation may not be without limits.

As the Supreme Court recognized, the regularity with which Congress has delegated its power "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Id.* In determining whether Congress had adhered to the commands of the Constitution in delegating its power to the Executive:

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[18] This doctrine is "by no means repudiated," particularly in this circuit. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

[19] The Property Clause provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, sec. 3, cl. 2.

> [W]e look to the statute to see whether the Congress had declared a policy with respect to that subject whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to act the prohibition.

Id. at 41. Thus, the key inquiry is whether Congress "has itself established the *standards of legal obligation,* thus performing its *essential legislative function*, or, by the failure to enact such standards, has attempted to transfer that function to others." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). Under the view of the Antiquities Act propounded by Defendant, there are no "standards of legal obligation." As a result, the Antiquities Act fails under the nondelegation doctrine just as the National Industrial Recovery Act (NIRA) failed. The challenged statutory provision in *Panama Refining*, Section 9(c) of the NIRA, reads very similarly to the Antiquities Act:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any...State.

Id. at 406 (quoting 15 U.S.C. § 709(c)).

However this "brief and unambiguous" grant of congressional authority was held to be unconstitutional because it failed to provide "whether or in what circumstances or under what conditions" the President was authorized to take action and because it "establishe[d] no criterion to govern the President's course." *Panama Refining*, 293 U.S. at 415. In fact, Congress "declares no policy" giving "to the President an unlimited authority to determine the policy and to [take action], or not to [take

action], as he may see fit." *Id.* Moreover, in *Panama Refining*, the Act "simply defines the subject of the prohibition which the President is authorized to enact or not to enact as he pleases." *Id.* at 420. "Congress left the matter to the President without standard or rule [and "without limits or controls"], to be dealt with as he pleased." *Id.* at 419.

But under the interpretation of the Antiquities Act as set forth by Defendant that is what Congress did by its adoption of the Antiquities Act. As the Supreme Court recognized in *Panama Refining*, 293 U.S. at 432, a failure to require Defendant to comply with congressional conditions an prerequisites to the exercise of the delegated authority "would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power." If Defendant has total discretion under the Antiquities Act and any action taken under that Act is completely unreviewable, the Antiquities Act effectively invests Defendant with "uncontrolled legislative power" over federal lands, which is, pursuant to the Property Clause, the sole responsibility of Congress. *Id.* Because, under the interpretation advanced by Defendant, the Act "declares no policy" and gives "to the President an unlimited authority to determine the policy and to [take action], or not to [take action], as he may see fit," the Antiquities Act is unconstitutional. *Id.* The Act grants to Defendant complete and unlimited discretion, "simply defin[ing] the subject of the prohibition which the President is authorized to enact or not to enact as he pleases." *Id.* at 420. Such a delegation is not constitutionally permissible. *Id.* Defendant and Intervenors' Motion to Dismiss must be denied.

2. Broad delegations of congressional power have been upheld only where Congress has performed its essential legislative function.

The Supreme Court has upheld the delegation of congressional power to the Executive only when that grant of power did not "in any real sense, invest the president with the power of legislation" because "[action to be taken by the President] was absolutely required when the president ascertained the existence of a particular fact." *Panama Refining*, 293 U.S. at 426. Thus, it could not be said that the President "exercised the function of making laws," rather he "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will laws to take effect." *Id., see Yakus v. United States,* 321 U.S. 414 (1944).

Under *Yakus*, both "statutory standards and declaration of policy," in the form of a "rule" or "statutory standards and declaration of policy," in the form of a "rule" or "statutory command" as well as "standards" to be followed, are necessary in order for a court to determine "whether the will of Congress has been obeyed." *Yakus,* 321 U.S. at 424-25. In *American Power & Light Co. v. Securities Exch. Comm'n,* 329 U.S. 90, 105 (1946), the Supreme Court held that Congress must clearly delineate "the general policy" as well as the "boundaries of [] delegated authority" because it is impossible to determine whether the will of Congress has been obeyed where Congress has provided criteria for discretionary action but has failed to provide when that discretion should be exercised.

For example, in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 214-15 (1989), the Supreme Court held that, under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), Congress had confined the Secretary of Transportation's discretion with rather specific criteria and had provided the "general rule" or "command," which was that pipeline safety user fees be established and collected. *Id.* at 214-15.

Recently, in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. ---, 121 S. Ct. 903, 913 (2001), the Supreme Court upheld the delegation of legislative authority in the Clean Air Act, by which Congress instructed the Environmental Protection Agency to set ambient air quality standards at a level that is "requisite to protect the public health" with "an adequate margin of safety." The Supreme Court held that the delegation was sufficiently similar to others that have been upheld, citing various precedents in which the legislative policy could be ascertained. *Id.* at 912 (citing *Touby, Yakus,* and *National Broadcasting*).[20]

Under the view of the Antiquities Act propounded by Defendant, the Antiquities Act fails to provide the requisite "statutory command" for the President's discretion sufficient to constitute an "intelligible principle" by which a court may determine "whether the will of Congress has been obeyed." *See, Yakus*, 321 U.S. at 425, *Touby*, 500 U.S. at 165, 168. Because the Antiquities Act assigns to the President the performance of an "essential legislative function," a legislative function that under the Property Clause is the exclusive province of Congress, the delegation of that legislative authority is unconstitutional. Therefore, because Defendant had no authority to issue the challenged proclamations, Defendant acted in violation of the Property Clause in designating the Grand Canyon-Peasant, Canyons of the Ancients, Cascade-Siskiyou, Hanford Reach,

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[20] Noting that the Constitution requires that "[a]ll legislative Powers" shall be vested in Congress, Justice Thomas concluded that improper delegation of the essential legislative function can occur even when a delegation contains "intelligible standards." *American Trucking*, 531 U.S. at ---, 121 S. Ct. at 920 (Thomas J., concurring). "I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.*

Ironwood Forest, and Sonoran Desert National Monuments.[21]

C. The Monument Proclamations Violate Clearly Expressed Congressional Intent.

1. The will of Congress with regard to the designation of national monuments is clearly expressed in the statutory language.

The Antiquities Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

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[21] The cases cited to by Defendant (*Cameron v. United States*, 252 U.S. 450 (1920); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. California*, 436 U.S. 32 (1978)) are of no precedential value because the nondelegation issue was not addressed in those cases. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1954) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point ."); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1331 n.1 (Fed. Cir. 1998) ("Because the issue of preemption was not addressed, this [line of] precedent is of little value to us in deciding this appeal."); *United States v. Ursery*, 59 F.3d 568, 575 n. 6 (6th Cir. 1995) ("the fact that the Court did not address the [issue] simply has no precedential value in this case.").

16 U.S.C. § 431.

On its face, the plain language of the Antiquities Act clearly expresses congressional intent with regard to the objects to be protected under the Act. The Act specifically limits the designation of national monuments to "historic landmarks, historic and prehistoric structures, and other *objects* of historic or scientific interest that are *situated upon* the [public] lands." *Id.* (Emphasis added). The language of the Act thus reveals congressional intent to preserve ruins, artifacts, and other man-made objects on the land, and not the land itself.

Congress also provided that the limits of national monuments "in all cases shall be confined to the smallest area" possible allowing for the protection of the historic ruins and relics. By including this language in the statute, Congress declared its intent that the reservations of public land surrounding the monuments were to be relatively small in size, and only so large as necessary for the protection of each individual object deemed worthy of national monument protection.

Therefore, the brief but plain language of the Antiquities Act clearly envinces congressional intent to protect individual man-made objects with historic or scientific qualities deserving of preservation surrounded by the smallest possible reservation of public lands necessary for protection of the monument.

2. The will of Congress with regard to the designation of nation monuments is clearly expressed in the legislative history of the Antiquities Act.

The legislative history of the Antiquities Act makes it clear that what Congress intended to protect as national monuments were rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts. The early

legislative history reveals that Congress had a limited purpose in mind: the protection of small areas in the southwest United States containing prehistoric ruins and Indian artifacts. H.R. Rep. NO. 56-1104 (1900) (discussing a bill "for the preservation of prehistoric monuments, ruins, and objects on public lands"). Congress determined the only practical way to preserve these ruins was "by creating reservations of the land surrounding each ruin" and penalizing those who would vandalize or destroy the ruins. *Id.*

After several drafts, the Antiquities Act was passed in 1906. The House Committee on Public Lands explained:

> There are scattered throughout the Southwest quite a large number of very interesting ruins. ... The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

H.R. Rep. No. 5902224 (1906). Similarly, in recommending passage of the bill, the Report of the Senate Committee on Public Lands referred to the importance of preserving "historic and prehistoric ruins and monuments" and noted that the "bill is carefully drawn." S. Rep. No. 59-3797 (1906). As evidenced by this legislative history, the House and Senate committees with jurisdiction over the bill did not ascribe much significance to the phrase "other objects of historic or scientific interest" and did not anticipate the expansive interpretation that would later be given to that phrase by Defendant.

In the early years of the bill's consideration, the Interior Department proposed legislation authorizing the President to set aside areas "for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest." Lee, Ronald F., *The Antiquities Act of 1906*, at 52-55 (Nat'l Park Svc. 1970).

The House committee rejected such a broad grant of executive authority, *id.* at 55, and specifically omitted any reference to "scenic beauty" and "natural wonders." *Id.* at 68-71.

The legislative history clearly reveals that scenic beauty and natural landforms were not to be a basis for monument designation.[22] Rather, the Act was intended to protect man-made objects "situated upon" the public lands and not the public lands themselves. 16 U.S.C. § 431.

The floor debate on the bill only reinforces congressional intent not to grant broad withdrawal authority to the President by way of the Antiquities Act. Representative Lacey, chairman of the House public Lands Committee stated that the bill "will merely make small reservations where the objects are of sufficient interest to preserve them." 40 Cong. Rec. 7888 (1906). Rep. Lacey further stated that the bill "is meant to cover the cave dwellers and cliff dwellers." *Id.* Rep. Stephens of Texas, expressing concerns about the scope of the bill, questioned, "How much land will be taken off the market in the Western States by passage of the bill?" *Id.* Rep. Lacey responded, "Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved." *Id.* Assuring Rep. Stephens that the Act would not be anything like the forest-reserve bill, "by which seventy or eighty million acres of land in the United States have been tied up," Rep. Lacey confirmed that "[t]he object is entirely different. It is to preserve these old objects of special interest and the

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[22] Acknowledging this history, Frank Bond, the Chief Clerk of the General Land Office, stated at a National Park Service conference in 1911, "The terms of the monument act do not specify scenery, nor remotely refer to scenery, as a possible *raison d'etre* for a public reservation." Lee, *The Antiquities Act of 1906*, at 109.

Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses." *Id.*

It is beyond doubt that Congress never intended or anticipated the use of the Antiquities Act to designate national monuments of the purpose, scope, and size of the six monuments challenged in this case. In this case, Defendant withdrew and set aside over 2,040,000 acres of public land totally contrary to the limited constitutional authority granted to him by the Antiquities Act. The fact that Congress never intended this result under the Antiquities Act is particularly clear give Congress' reassertion of its Property Clause authority in the enactment of the Federal Land Policy and Management Act (FLPMA) and the attendant narrowing of Executive authority with regard to federal property issues. *See* 43 U.S. C. § 1701(4). Accordingly, following Congress' enactment of FLPMA, the Antiquities Act must be interpreted strictly in accordance with its original intent. *Id.*

3. The monument Proclamations facially defy the expressed intent of Congress.

The Antiquities Act itself and the legislative history of that Act demonstrate that Congress never contemplated federal lands would be designated as monuments for the purposes of scenic beauty, natural wonders, geologic formations, forests, rivers, plants, animals or any other aspect of nature. Rather, Congress enacted the Antiquities Act solely for the protection of ruins, relics, and other man-made objects of historic or scientific interest, to be surrounded by a small reservation of land as necessary to prevent vandalism and the destruction of those ruins, relics, and other man-made objects. Because the Proclamations designating the monuments challenged in this case purport to protect as national monuments various aspects of scenery, landscape, and nature, the monument designations are contrary to the clearly expressed will of Congress and are

unconstitutionally in excess o f the narrow grant of legislative authority intended by Congress.

The Proclamation establishing the Grand-Canyon Parashant National Monument purports to protect, *inter alia*, landscape, scenery, "natural splendor and a sense of solitude," rocks, canyons, mountains, cliffs, vistas, ecosystems and wildlife, including threatened or endangered species.[23] 65 *Fed. Reg.* 2825, 2825-2827 (January 11, 2000). The Proclamation establishing the Canyons of the Ancients National Monument purports to protect, *inter alia*, rugged landscape, natural resources, cliffs, canyons, "spectacular land forms," and crucial habitat for wildlife.[24] 65 *Fed. Reg.* 37243, 37243-37244 (June 13, 2000). The Proclamation establishing the Cascade-Siskiyou National Monument purports to protect, *inter alia*, forests and groves, "wildflower-strewn meadows," canyons, geologic formations, ecological wonders, and a "spectacular variety of rare and beautiful species of plants and animals." 65 *Fed. Reg.* 37249, 37249 (June 13, 2000). The Proclamation establishing the Hanford Reach National Monument purports to protect, *inter alia*, landscape, ecosystems, riparian and aquatic habitat, "uncommon native plant and animal species," insects, "fragile macrobiotic crusts," and a stretch of the Columbia River.[25] 65 *Fed. Reg.* 37253, 37253-37254 (June 13, 2000). The Proclamation establishing the Ironwood Forest National Monument purports to protect, *inter alia*, desert vegetation, forests, mountain ranges,

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[23] The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, contains the sole delegation of congressional power as to the manner in which threatened and endangered species are to be protected.

[24] *See* fn. 9, *supra*, as to the ESA.

[25] The Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*, sets forth the manner in which Congress will protect rivers.

threatened or endangered species and habitat,[26] and a "quintessential view of the Sonoran Desert." 65 *Fed. Reg.* 37259, 37259 (June 13, 2000). Similarly, the Proclamation establishing the Sonoran Desert National Monument purports to protect, *inter alia*, desert landscape, desert ecosystems, mountain ranges, cactus forests, wildlife and habitat, natural water holes, and "patches of desert grassland." 66 *Fed. Reg.* 7354, 7354-7355 (January 17, 2001).

Although each of the Proclamations, with the exception of the Cascade-Siskiyou Proclamation, eventually describes in very general terms an abundance or collection of archaeological sites or artifacts, the Proclamations do not identify any particular ruin or artifact to be specifically protected by the monument reservation. The Cascade-Siskiyou Proclamation makes no reference historic ruins or artifacts, but briefly refers to portions of an historic trail. The Proclamations create national monuments ranging in size from 52,000 to 1,014,000 acres.

Judicial review by this Court of Defendant's Antiquities Act designation of the six national monuments challenged here is essential to ensure that "the will of Congress is obeyed." *Touby*, 500 U.S. at 1757. Judicial examination of Defendant's actions in this case is necessary to ensure compliance with the limited grant of congressional power delegated to Defendant by Congress. This Court has jurisdiction to review Defendant's designation of the challenged national monuments for compliance with congressional intent as expressed in the language and legislative history of the Antiquities Act.

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[26] *See* fn. 9, *supra*, as to the ESA. In addition, the ESA contains the sole manner in which habitat for threatened or endangered species may be protected.

CONCLUSION

For the foregoing reasons, Defendant's and Intervenors' Motions to Dismiss must be denied.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument on this matter because this case concerns unique and precedent-setting issues of nationwide significance. Oral argument would benefit the Court in this matter of critical constitutional importance and would serve the interests of justice.

DATED this 12th day of April, 2001.

Respectfully submitted,

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